U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 10 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pharmaceutical services business. It seeks to employ the beneficiary permanently in the United States as an accountant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The record demonstrates that the appeal was properly filed, was timely, and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated June 29, 2007, the basis for denial of this case was whether or not the beneficiary had the requisite education for the position as of the priority date. The AAO also finds that the petitioner failed to establish its ability to pay the beneficiary the proffered wage as of the priority date.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on October 26, 2006.[1] The Immigrant Petition for Alien Worker (Form I-140) was filed on February 20, 2007.

[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an

The beneficiary completed a three-year bachelor of commerce degree with a concentration in financial accounting and auditing at the University of Bombay in 1986 and two-year master of commerce degree with a concentration in advanced accounting at the Shivaji University in 1991. Thus, the issue is whether the beneficiary's master of commerce degree may be deemed a foreign degree equivalent to a U.S. master's degree in accounting because it is based on less than a four-year bachelor's degree and because commerce is a distinct field from accounting. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the

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immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[2] In order to have experience and

[2] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa

education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

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classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

The instructions for the ETA Form 9089, Part H, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: master's.

4-B. Major Field Study: accounting.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: none in the position offered,

10. or 24 months in the related occupation of accounting.

14. Specific skills or other requirements: (none mentioned).

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

As set forth above, the proffered position requires four years of study culminating in a bachelor's degree and two years of study culminating in a master's degree in accounting.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was a master's degree with a major in accounting and audit. He listed the institution of study where that education was obtained as the Shivaji University and the year completed as 1991.[3]

[3] The AAO notes that the beneficiary's master's degree diploma reflects a different degree concentration than what the beneficiary represented on the ETA Form 9089. The diploma states that the beneficiary instead earned a master of commerce degree with a concentration in advanced accounting. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's bachelor's of commerce degree with a concentration in financial accounting and auditing diploma from the University of Bombay in 1986. The petitioner also submitted a copy of the beneficiary's master's of commerce degree with a concentration in advanced accounting from the Shivaji University in 1991.

The petitioner initially submitted one credentials evaluation, dated November 26, 2001, from World Education Services, Inc. The evaluation describes the beneficiary's high school, bachelor's, and master's diplomas and concludes that they culminate in an equivalence to a master's degree in business administration in the United States.[4] This evaluation does provide information regarding the beneficiary's semester credits and grades and their purported U.S. equivalency, but it does not explicitly state how this evaluating company reached its conclusion as to the academic equivalency of the beneficiary's education.

On appeal, the petitioner submitted three additional credentials evaluations. The first evaluation, dated July 13, 2007, is from [redacted] of the Trustforte Corporation. The evaluation describes the beneficiary's bachelor's and master's diplomas and concludes that they culminate in an equivalence to a master's degree in business administration with a concentration in accounting in the United States.[5] [redacted] bases his conclusion on the academic reputations of the beneficiary's bachelor's and master's programs, the beneficiary's number of hours and years of coursework, and the nature of the coursework.[6] The second evaluation, dated July 12, 2007, is from [redacted] of the Foundation for International Services, Inc. The evaluation describes the beneficiary's high school, bachelor's, and master's diplomas and concludes that they culminate in an equivalence to a master's degree in business administration with a specialization in accounting in the United States.[7] Within her evaluation, [redacted] does not state how she reached her conclusion as to the academic equivalency of the beneficiary's education. The third evaluation, dated July 17, 2007, is from International Education Evaluations, Inc. The evaluation describes the

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> reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

[4] The AAO notes that a master's degree in business administration is not the same as a master's degree in accounting.

[5] The AAO notes that a master's degree in business administration with a concentration in accounting is not the same as a master's degree in accounting.

[6] The AAO notes that specifically [redacted] concludes that "the nature of the courses and the credit hours involved, considered together with his prior bachelor studies, indicate that [redacted] attained the equivalent of a Master of Business Administration Degree with a concentration in Accounting, from an accredited U.S. university." No further analysis of credit hours or courses taken was provided.

[7] The AAO notes that a master's degree in business administration with a specialization in accounting is not the same as a master's degree in accounting.

beneficiary's high school, bachelor's, and master's diplomas and concludes that they culminate in an equivalence to a master of science degree in accounting in the United States. This evaluation also does not state how this evaluating company reached its conclusion as to the academic equivalency of the beneficiary's education.

The AAO notes that these credentials evaluations come to different conclusions as to the equivalency of the level of education that the beneficiary has obtained. The AAO further notes that the beneficiary's master's degree diploma reflects a different degree concentration than what the beneficiary represented on the ETA Form 9089. The diploma states that the beneficiary earned a master of commerce degree with a concentration in advanced accounting, but the ETA Form 9089 states that the beneficiary earned a master's degree with a major in accounting and audit. *See Matter of Ho.*

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The director denied the petition on June 29, 2007. He determined that the beneficiary's master's of commerce degree with a concentration in advanced accounting could not be accepted as a foreign equivalent degree to a U.S. master's degree in accounting because the beneficiary had not first completed a four-year bachelor's degree.[8]

The AAO notes that the labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of degrees, or alternatives to a four-year degree, that are individually less than a single-source U.S. master's degree or its foreign equivalent when the labor market test was conducted or whether an alternate field of study would be accepted.

Moreover, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[9] According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information

[8] The AAO notes that none of the academic evaluations that the petitioner submitted state that the beneficiary possessed a four-year bachelor's degree.

9 In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

technology and student services." According to the registration page for EDGE, http://aacraoedge.aacrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at *www. Aacrao.org/publications/guide to creating international publications.pdf.* If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

EDGE provides a great deal of information about the educational system in India, and, while it confirms that a bachelor of commerce degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

EDGE also discusses master of commerce degrees, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE asserts that a master of commerce degree "represents attainment of a level of education comparable to a bachelor's degree in the United States."

The AAO notes that, on appeal, counsel merely states that the beneficiary possessed the requisite educational requirements for the position. To strengthen this assertion, counsel provides the three aforementioned educational equivalency evaluations. The AAO finds that these three evaluations generally fail to delineate how their evaluators reached their conclusions and fail to evidence consistently that the beneficiary has the requisite education in the specified field of accounting. They also come to different conclusions as to the equivalency of the beneficiary's educational background. The petitioner has not provided any evidence, whether it be by statement, by supporting documentation from the labor certification, or by prior correspondence with DOL, that it intended for the position to require educational experience less than that of a United States master's degree in accounting or alternatives to a four-year bachelor's degree.

The ETA Form 9089 does not provide that the minimum academic requirements of a four-year bachelor's degree or a two-year master's degree in accounting might be met through some other formula other than that explicitly stated on the ETA Form 9089. The beneficiary does not have a United States baccalaureate or master's degree or foreign equivalent degrees, and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification because he does not possess the equivalent of a United States master's degree in accounting. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The AAO also finds that the petitioner failed to establish its ability to pay the beneficiary the proffered wage as of the priority date. An application or petition that fails to comply with the

technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 Application for Permanent Employment Certification was accepted for processing by the DOL national processing center. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on October 26, 2006 and certified on December 15, 2006. The proffered wage as stated on the ETA Form 9089 is $28.54 per hour ($59,363.20 per year).

The evidence in the record of proceeding does not show whether the petitioner is structured as a C or an S corporation. On the petition, the petitioner claimed to have been established in 1991 and to employ 25 workers currently. Based upon the record, it is unclear whether the petitioner's fiscal year is based on a calendar year. The petitioner did not list its net annual income or gross annual income on the petition. On the ETA Form 9089, signed by the beneficiary on January 22, 2007, the beneficiary claimed to have worked for the petitioner from May 2005 to October 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date.

Counsel submitted an IRS Form W-2 Wage and Tax statement from the petitioner to the beneficiary for 2006 in the amount of $50,000.08. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is $59,363.20 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage in 2006, which is $9,363.12, and the full proffered wage for subsequent years.

The petitioner has not submitted any federal income tax returns or any other regulatory-prescribed evidence of its financial status, so its yearly amounts of net income and net current assets since the priority date in 2006 are unknown. USCIS and the AAO therefore have no concrete evidence upon which to assess the ability to pay and the bona fides of the petitioning company. The petitioner failed to meet its burden of proof to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

Accordingly, from the priority date or when the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets.

The record of proceeding contains copies of the petitioner's bank statements from 2006. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would be considered in determining the petitioner net current assets had they been submitted.

The record also contains copies of checks made out to the beneficiary by the petitioner for work performed in 2006 and 2007. The AAO notes that these checks constitute insufficient evidence of wages paid, because there is no evidence that they were cashed and processed by a bank.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. The petitioner has been in business since 1991 and has employed 25 workers, but it has failed to demonstrate that it has even close to enough net income or net current assets to pay the difference between wages actually paid and the proffered wage for 2006 or the full proffered wage for subsequent years. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.